Amboy Care Center *and* 1115 Nursing Home and Service Employees Union—New Jersey A, a Division of 1115 District Council, Petitioner. Case 22–RC–11068

September 23, 1996

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held July 27, 1995, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 29 for the Petitioner; 31 for the Intervenor, Amalgamated Local 747, Health Care Employees Union; and zero votes for no union, with 5 determinative challenges.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's recommendations[1] only to the extent consistent with this Decision and Direction of Second Election.

The Petitioner has excepted, inter alia, to the hearing officer's recommendation that its Objection 1 be overruled. In that objection, the Petitioner alleged that the Employer threatened employees with a loss of wages and benefits if they supported the Petitioner. For reasons that follow, we find merit in the Petitioner's exception.

Background

This case involves an election with two unions on the ballot. Amalgamated Local 747, Health Care Employees Union, the Intervenor, is an incumbent union that has represented the Employer's service and maintenance employees. Its most recent contract with the Employer was effective from July 1, 1992, to June 30, 1995. In March 1995, 1115 Nursing Home and Service Employees Union—New Jersey A, a Division of 1115 District Council filed a petition seeking to represent the service and maintenance employees.

At issue here is whether the Employer, in its letters to employees dated July 6 and 26, 1995, threatened employees with a loss of wages and benefits should they choose the Petitioner to replace the Intervenor.[2]

In its July 6 letter to employees, over the signature of its executive director, Sheree Urgo, the Employer informed employees in pertinent part:

> I strongly believe that this new union has no place in this Home. It will do nothing other than destroy the relationship that we presently have with our employees and it would only cause us to start negotiating a new contract from scratch which may take many months, or even longer.

The letter continued in pertinent part:

> I would suggest very strongly that you either stick with your present union Local 747, which would at least begin negotiating a contract from the point at which we are now at. They would get you a contract and increased benefits much quicker. Or vote for no union at all. But, to bring in a new union and to start negotiations from scratch would be a total waste of time and would, we believe, be very detrimental to you.

The Employer's July 26 letter, circulated the day before the election, added in pertinent part:

> I still firmly believe as does the entire management of Amboy Care Center that a vote for [the Petitioner] would be a major mistake. Please, please, do not believe everything that is told to you. As I tried to tell you previously, do not believe what this new union is telling you in order to sell themselves. Please ask [the Petitioner] about the many Nursing Homes in which they do not have a contract or have not had a contract. In many of their Homes it has taken them years to get a contract.

The hearing officer essentially concluded that the Employer had merely described the bargaining process and that its statements did not include either objectionable promises or threats. Thus, he recommended overruling the Petitioner's Objection 1.

Discussion

The Board has held that, in a multiunion election, an employer may, in a noncoercive manner, state its preference for one union over another union.[3] Thus, an employer may express its views regarding the advan-

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenges to the ballots of voters Mary Ann DeJesus, Marie Chery, and Marjorie Bernadin. Further, in the absence of exceptions, we adopt pro forma the hearing officer's findings that Thomas Polak and Antoinette Greenidge are eligible voters and the hearing officer's recommendation that the challenges to their ballots be overruled.

Finally, in the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's Objections 4, 5, 6, and 7 be overruled.

[2] In light of the varying testimony regarding the Employer's statements at a late June employee meeting, we do not rely, in sustaining the Petitioner's Objection 1, on any employer statements made at that meeting.

[3] See, e.g., *Alley Construction Co.*, 210 NLRB 999, 1005 (1974). In *Alley*, an employer, while setting forth its views of the advantages of employee representation by one union rather than another union, emphasized that it would negotiate in good faith with whichever union the employees selected.

tages or disadvantages of representation by one of several competing unions. An employer may not, however, threaten or promise employees that it will act in a different manner depending on what union the employees choose to represent them.[4]

Here, we find that, viewed in its totality, the Employer's message to employees was a threat to act in a disparate and harsher manner towards the employees' chosen representative should the employees choose the Petitioner to represent them. At the same time, the Employer promised harmonious and beneficial bargaining with the Intervenor.

The Employer emphasized that bargaining would start from scratch if the employees selected the Petitioner. The Employer promised that a "contract and increased benefits" would follow "much quicker" if employees retained the Intervenor. Significantly, the Employer threatened that "very detrimental" consequences would occur if employees selected the Petitioner to represent them. Finally, in this context of setting forth all the dire effects that would follow a Petitioner victory, the Employer's election eve statement that choosing the Petitioner would be a "major mistake" underscored the differences that would result if the Petitioner became the representative.

In this case, as in *Fabriko*, supra, the Employer went beyond setting forth its preferences and its opinions regarding representation by an incumbent union. The Employer here essentially threatened employees that delayed benefits and "detrimental" effects would accompany a Petitioner victory. It impliedly promised that it would maintain a more generous bargaining posture if the Intervenor were retained. Thus, its statements, like those found objectionable in *Fabriko*, conveyed the Employer's intention to bargain in a disparate manner as between the two labor organizations.

Contrary to the hearing officer, we do not view the Employer's statements as merely benign pronouncements regarding the give and take of collective bargaining or a mere prediction that bargaining with a new union might take longer. The vice in the Employer's pronouncements was its strong suggestion that the Employer would alter matters within its control if employees chose the Petitioner.[5]

Therefore, we find that the Employer conveyed to employees that it would act differently in bargaining regarding matters within its control based on the employees' selection in the election. The Employer thus engaged in objectionable conduct warranting setting aside the election.[6]

[Direction of Second Election omitted from publication.]

[4] See, e.g., *Fabriko, Inc.*, 227 NLRB 387 fn. 2 (1976). In *Fabriko*, an employer, by setting forth dramatically different scenarios of how bargaining would proceed depending on which of two unions the employees selected, effectively threatened employees that it intended to bargain in a disparate manner as between the two unions.

[5] The hearing officer relied on *BI-LO*, 303 NLRB 749 (1991), in finding that the Employer's bargaining from scratch statements were not objectionable. In that case, the Board concluded that an employer's statements amounted to a lawful description of the bargaining process. But, again, the precise issue here, unlike in *BI-LO*, is whether the Employer statements suggested to employees that it would employ disparate bargaining postures—one for the Intervenor and a different one for the Petitioner. Here, according to the Employer, the bargaining from scratch would follow only if the Petitioner won the election.

Similarly, in *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992), cited by the hearing officer, the Board found an employer's statements regarding the length of negotiations for a first contract to be lawful. Here, the Employer conveyed that negotiations with the Intervenor would be shorter, productive, and harmonious while negotiations with the Petitioner would be long, drawn out, and perhaps unproductive. Again, it implied that it would bargain differently depending on whom the employees chose to represent them.

[6] Inasmuch as we have sustained the Petitioner's Objection 1 and as the two overruled challenges are not sufficient to permit the Petitioner to prevail in a revised tally, we shall not order that those ballots be opened and counted. Rather, we shall direct a second election.

Also, in light of our decision, we find it unnecessary to pass on the Petitioner's contention that the Employer interfered with the election by interrogating an employee regarding the election.